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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN MICHAEL PAVANO,

Defendant and Appellant.

G052546

(Super. Ct. No. 14WF2445)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Martin Kassman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Sean Michael Pavano appeals from a final judgment after a jury convicted him of misdemeanor child endangerment. He argues the evidence presented at trial was insufficient to support his conviction. We disagree and affirm the judgment.

FACTS

In June 2014, at approximately 5:00 p.m., passerby Michael O'Brien was walking on the pier in Huntington Beach with his grandson. O'Brien heard a child crying as he made his way back to his car along Pacific Coast Highway (PCH). O'Brien investigated the source of the crying and saw a young child sitting on the ground about a foot behind a park bench. On the bench was Pavano, a man who O'Brien thought appeared to be homeless and passed out. The child was dirty and half-clothed.

Pavano was lying down on the bench on his back with his legs stretched out and extremely disheveled. O'Brien observed Pavano was not alert, did not respond to the child's crying, and never moved at all. Pavano was not blocking the child's potential path of travel, and O'Brien was concerned the child would walk into traffic or someone would try and kidnap the child. O'Brien called 911.

Huntington Beach police responded to the scene and found a small child, about three years old, sleeping on the ground next to a bus stop bench. Police saw Pavano lying on his back on the bench, asleep. Pavano's feet were on top of the bench and his arms were on his chest. The bench was about six feet from the edge of PCH, which has a speed limit of 50 miles per hour. Cars were traveling at the speed limit at the time of the incident. The responding police officers were concerned the child could wake up and end up in the road, so one officer physically blocked the path to the street while the other began to make contact with Pavano. Officers saw the child walking without difficulty. An officer testified an unsupervised child in that area "could very easily wander into traffic on [PCH] where the speed limit . . . is 50 miles an hour. And obviously if a child that size were to be hit by a vehicle, the consequences would most certainly be lethal." It took police about four attempts to rouse Pavano.

The police officers observed Pavano was lethargic, his eyes were red and watery, and smelled of alcohol. Pavano answered the officer's questions, his speech was not slurred, but he spoke slowly and deliberately. The responding officer believed Pavano was under the influence of alcohol. Pavano told officers he smoked marijuana at about 6:00 that morning. They noticed Pavano had symptoms consistent with someone under the influence of marijuana, including slow speech, droopy eyelids, lethargy, and dry, chapped lips. Officers did not conduct any tests to determine whether Pavano was under the influence.

The police conducted an investigation into the child's well-being. Pavano stated he was caring for his girlfriend's child while she was shopping. Pavano initially denied sleeping on the bench, but after confronted further changed his story and said he "accidentally dozed off." Officers testified their primary concern was the child could have easily wandered into traffic on PCH. The officers arrested Pavano at the scene for child endangerment.

At trial, Pavano testified he put the child behind the bench because he felt it was the safest place. He also claimed he put his arm and foot on the railing behind the bench to block the child from running into the street. He admitted he could have been asleep for four or five minutes. Pavano further testified he did not plan on putting the child in any danger and that any lapse in judgment was unintentional.

An information charged Pavano with smuggling methamphetamine into a correctional facility (Pen. Code, § 4573; count 1),¹ possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 2), and felony child endangerment (§ 273a, subd. (a); count 3).² The information also alleged a prior prison term pursuant to

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² Because this appeal concerns only count 3, facts pertinent only to the drug possession charges in counts 1 and 2 are not summarized here.

section 667.5, subdivision (b). Pursuant to the prosecution's motion, the trial court amended the information and reduced count 3 to a misdemeanor. Count 2 was also reduced to a misdemeanor. The jury found Pavano guilty of count 3, misdemeanor child endangerment. The jury hung on counts 1 and 2.

The trial court suspended Pavano's sentence and granted him formal probation for 18 months. The court dismissed counts 1 and 2 pursuant to section 1385.

DISCUSSION

Pavano's argument on appeal is the evidence at trial was insufficient to support his conviction of misdemeanor child engagement. Pavano claims this lack of evidence on count 3 violated his due process rights. For the reasons discussed below, we disagree with Pavano.

Our standard of review on a challenge to the sufficiency of the evidence to support a conviction is whether "on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) A reviewing court may not reverse a conviction based upon insufficient evidence unless it is clear "that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) In order to affirm a conviction, we must find substantial evidence supports each element of the offense. (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 533.)

The jury found Pavano guilty of section 273a, subdivision (a), which states: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years." Under the statute, the "willful"

requirement does compel intent to injure the child, but “implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage [citations].” (*People v. Lee* (1991) 234 Cal.App.3d 1214, 1221.)

A criminal negligence conviction does not require a showing defendant purposefully placed a child in a dangerous situation. (*People v. Valdez* (2002) 27 Cal.4th 778, 787-791 (*Valdez*).) Instead, criminal negligence is shown where a defendant engages in “‘aggravated, culpable, gross, or reckless . . . conduct . . . [that is] such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life.’ [Citation.]” (*Id.* at p. 783.)

Pavano claims there was insufficient evidence to support his conviction because the jury needed to conclude he intentionally fell asleep to find him guilty of count 3. Not so. Whether Pavano intentionally or accidentally fell asleep ignores the fact that evidence presented at trial demonstrated Pavano purposefully: ingested marijuana and alcohol before watching the child; brought the child to the beach; lay down on the bench and closed his eyes while watching the child; and placed the child in close proximity to a busy street with little or no impediment to the child running into traffic. The evidence showed Pavano took several intentional actions that led to the child’s potential endangerment. It was certainly reasonable for the jury to rely on this evidence to conclude Pavano’s acts were a gross departure from how an ordinarily careful person would act in the same situation.

Pavano also contends there was no evidence that smoking marijuana in the morning could cause a person to fall asleep hours later in the afternoon. Pavano ignores

the fact that officers also observed an odor of alcohol and symptoms of drunkenness at the scene. Even assuming, without deciding, the effects of marijuana had worn off by the time Pavano got to the bench with the child, on the evidence presented it was reasonable for the jury to determine Pavano might have been under the influence of alcohol or another drug. In any event, Pavano did not need to be drunk or high to support his conviction. Even a sober person who places a three-year-old child, unsupervised, in close proximity to a heavily trafficked roadway could potentially be found guilty under section 273a, subdivision (a).

Substantial evidence supports Pavano's conviction for misdemeanor child endangerment. Based on the entire record, there is sufficient evidence supporting Pavano's conviction of count 3 under both the federal and state constitutional due process clauses. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.)

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.